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No. 80-1681

In the
Supreme Court of the United States
October Term, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, et al.,
Appellants.

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation,
Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit.

BRIEF AND ARGUMENT FOR THE APPELLEE

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals Correctly Found the Hoffman Estates Ordinance and Accompanying Guidelines Unconstitutional For Vagueness Because They Fail to Provide Sufficient Notice to Merchants or Sufficient Guidelines for Enforcement and Adjudication?

A. Whether the Hoffman Estates Ordinance Exhibits Extreme Potential for Abuse, Infringes Upon First Amendment Rights, and, Therefore, Should Be Subjected to a Stringent Standard of Review?

B. Whether the Ordinance and Guidelines Fail to Adequately Apprise Merchants of Which Items Or Manner Of Display Will Initiate Enforcement?

C. Whether the Hoffman Estates Scheme Countenances Arbitrary and Discriminatory Enforcement By Failing to Provide Explicit Standards to Those Entrusted to Enforce the Law?

II. Whether the Hoffman Estates Scheme is a Strict Liability System and, Therefore, The Merchant's State Of Mind Is Irrelevant.

III. Whether, Assuming *In Arguendo* The Ordinance Requires An Intent Element, When the Subject Matter of the Ordinance Is Not Susceptible to Reasonable Clarity, an Intent Requirement Cannot Cure the Underlying Vagueness?

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CONSTITUTIONAL PROVISIONS, ORDINANCES, AND LICENSE GUIDELINES INVOLVED

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment, §1 to the United States Constitution states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ORDINANCE NO. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

Now THEREFORE, BE ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

***Section 1*: That the Hoffman Estates Municipal Code be amended by adding thereto an additional section, Section 8-7-16, which additional section shall read as follows:**

Sec. 8-7-16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs	$150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper or colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

Pipes—if displayed away from the proximity of non-white paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

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THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation,
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On Appeal From The United States Court Of Appeals For The Seventh Circuit.

BRIEF AND ARGUMENT FOR THE APPELLEE

PREFATORY NOTE

The Criminalization of Implements of Crime

In *One 1958 Plymouth Sedan* v. *Commonwealth of Pennsylvania,* 380 U.S. 693 (1965), this Court articulated a distinction between *derivative* contraband and contraband *per se* which has long been recognized in the law. This Court stated that contraband *per se* are "objects the possession of which, without more, constitutes a crime;" and that *derivative* contraband is lawful property "not intrinsically criminal in character," which be-

comes subject to legal restrictions only when a previous illegal use is established. *Id.* at 699-700. Numerous decisions by federal and state courts have drawn a similar distinction, and have required a substantial and concrete nexus between an otherwise innocent or neutral object and actual criminal activity involving the particular object before characterizing it as *derivative* contraband. *United States* v. *Farrell*, 606 F.2d 1341 (D.C. Cir. 1979); *United States* v. *McCormick*, 502 F.2d 281 (9th Cir. 1974); *Casias* v. *Patterson*, 398 F.2d 486 (10th Cir. 1968); *Davis* v. *Fowler*, 504 F.Supp. 502 (D. Md. 1980); *United States* v. *Jenison*, 484 F.Supp. 747 (D.R.I. 1980); *Kane* v. *McDaniel*, 407 F.Supp. 1239 (W.D. Ky. 1975); *United States* v. *One 1972 Datsun*, 378 F.Supp. 1200 (D.N.H. 1974); *Silbert* v. *United States*, 289 F. Supp. 318 (D. Md. 1968); *State* v. *Three ISO-2 Devices*, 296 N.W. 2d 510 (S.D. 1980); *Blackmon* v. *Brotherhood Protective Order of Elks*, 232 Ga. 671 (1974); *Commonwealth* v. *Fassnacht*, 369 A.2d 800 (Pa. Super. 1977); *People* v. *Steskal*, 55 Ill. 2d 157, 302 N.E. 2d 321 (1973); *People* v. *Zimmerman*, 44 Ill. App. 3d 601, 358 N.E. 2d 715 (1976). The *derivative* contraband/*per se* contraband distinction has been the conceptual underpinning of all laws which have attempted to attach penalties for the possession of instrumentalities of crime. Traditionally, the criminalization of "paraphernalia" has relied upon this distinction, and "paraphernalia" laws have historically been enforced only in one of two limited circumstances: either where an object is determined to be intrinsically well-suited for use in crime, having no significant lawful use and being readily distinguishable from objects not inherently sinister; or, where an object, otherwise lawful, has been found in an actual association with ongoing or consummated criminal activity.

Burglary tools have been treated as *derivative* contraband since it is commonly recognized that they are tools which are innocent of any association with crime until they have actually been put to use criminally. *See Benton* v. *United States*, 232 F.2d 341 (D.C. Cir. 1956); *Green* v. *District of Columbia*, 91 A.2d 712 (D.C. Ct. App. 1952); *cf. Universal Amusement Co., Inc.* v. *Vance*, 559 F.2d 1286, 1294 (5th Cir. 1977) ("jimmies" and "safecracking tools"). Laws making criminal the possession of burglary tools have been construed to require that an inherently innocent tool, such as a crow bar, has been connected with actual criminal activity. This *nexus* between the neutral tool and actual criminal activity is what establishes its status as *derivative* contraband, thereby permitting an inference of criminal intent. In only four situations has this *nexus* requirement been satisfied: where physical evidence directly connects a particular tool to a particular burglarious entry[1]; where the defendant and his tools are seized at or near to scene of a recent burglary[2]; where the defendant has sur-

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[1] *State* v. *Myott*, 246 N.W.2d 786 (S.D. 1976) (screwdriver linked to fresh pry marks on window); *State* v. *Heitman*, 473 S.W.2d 722 (Mo. 1971) (paint scrapings on crowbar); and *State* v. *Olsen*, 43 Wn.2d 726 (1953) (microscopic comparison of striations on sledgehammer and safe dial).

[2] *State* v. *Heitman*, 473 S.W.2d 722 (Mo. 1971) (defendant found with tools near burglary site shortly after burglary); *Commonwealth* v. *Jones*, 343 N.E.2d 172, 33 A.L.R.3d 788 (Mass. 1969) (tools found in an automobile in the vicinity of a recent burglary); *Cf., Pamphlet* v. *State*, 271 So.2d 403 (Miss. 1972) (numerous tools useful for burglary purposes, but no evidence of use in actual burglary, so evidence insufficient).

repticiously concealed the tools;[3] and where the defendant equipped with tools, is discovered trespassing and is unable to account for his presence or the tools' intended function.[4] Courts interpreting burglary tool statutes have noted that although certain tools could be used criminally for burglary purposes, the legitimate purposes for which such tools are ordinarily used prohibit any inference of inherent criminality. *People* v. *Spencer,* 10 Ill. App. 3d 229, 294 N.E. 2d 17 (1973); *Pamphlet* v. *State,* 271 So. 2d 403 (Miss. 1972); *Benton* v. *United States, supra.*

An examination of decisions by courts considering counterfeiting, gambling, and eavesdropping paraphernalia demonstrates that the *derivative* contraband/*per se* contraband formula has been adhered to faithfully. Under 18 U.S.C. §492, a printing press, if actually used to print counterfeit money, is subject to forfeiture as a form of

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[3] *People* v. *Borrero,* 26 N.Y.2d 430, 311 N.Y.S.2d 475, 259 N.E.2d 902 (1970) (defendants spotted walking away from automobile concealing a screwdriver); and *State* v. *Hart,* 200 Kan. 153, 434 P.2d 999 (1967) (sledgehammer concealed in topcoat).

[4] *Commonwealth* v. *Morgan,* 401 A.2d 1182 (Pa. Super. 1979) (defendant found trespassing on property while canvassing a house); *People* v. *Clerk,* 68 Ill. App. 3d 1021, 25 Ill. Dec. 359, 386 N.E.2d 630 (1979) (defendant found standing over victim after he unlawfully entered the house); *State* v. *West,* 18 Wash. App. 686, 571 N.W. 2d 237 (1977) (defendant found attempting to enter into back door of supermarket); *Stanley* v. *State,* 512 P.2d 829 (Okl.Cr. App. 1973) (defendant found in lumber yard with no explanation). For a more extensive annotation see 33 A.L.R.3d 798, "Validity, Construction, and Application of Statutes Relating to Burglars' Tools."

derivative contraband.[5] Under 18 U.S.C. §1953(a), proof of actual involvement of ordinary materials in an interstate gambling operation appears necessary for a violation[6]; but 15 U.S.C. §1171 requires proof of the inherent criminality of an object alleged to be a "gambling device"[7]. In a similar manner, 18 U.S.C. §2512 requires proof that a device is inherently useful for surrepticious interception by virtue of its design characteristics before it can be characterized as a communication intercepting device.[8]

Courts which have reviewed the quantum of evidence which justifies forfeiture of bootlegging implements or conviction for possession of devices or ingredients use-

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[5] *Mayo* v. *United States*, 413 F.Supp. 160, 161-62 (E.D. Ill. 1976) (government failed to prove object was used in prohibited manner, so evidence insufficient); *United States* v. *One Chief 1722 Offset Press*, 129 F.Supp. 276, 277 (D.Mass. 1955) (printing press discovered with illegal plates and counterfeit currency).

[6] *United States* v. *Scaglione*, 446 F.2d 182, 186-87 (5th Cir.), *cert. denied* 404 U.S. 941 (1971) (flash paper seen at situs of gambling operation); *United States* v. *Zambito*, 315 F.2d 266, 267 (4th Cir.) *cert. denied* 373 U.S. 924 (1963) (adding machine, numbers books, scrap paper involved in gambling operation). *See also Gaffey* v. *Babb*, 50 Or. App. 617, 624 P.2d. 616, 623 (1981) (Discussing ORS 167.132: "The pencil and paper used to make gambling records may have many purposes but *once pencil is applied to paper to make a record*, the use of the paper is narrowed to one purpose *i.e.*, records commonly used in a gambling sceme.")

[7] *United States* v. *Three Trade Boosters*, 135 F.Supp. 24, 27-28 (M.D. Pa. 1955); *United States* v. *Two "Exhibit Rotary" Coin Operated Gambling Devices*, 107 F.Supp. 314, 315 (W.D. Okl. 1952).

[8] *United States* v. *Schweihs*, 569 F.2d 965, 968-69 (5th Cir. 1978); *United States* v. *Blast*, 495 F.2d 138, 161 U.S. App. D.C. 312 (D.C. Cir. 1974).

ful in the illegal manufacture of distilled alcohol have focused their inquiries on two questions: (1). whether the object or substance at issue is inherently sinister *per se;* and, (2). whether the setting in which an innocent object or substance was discovered indicates a concrete *nexus* with criminal activity. These cases have invariably involved *precursors* of bootlegged alcohol, *e.g.,* copper tubing, sugar, yeast, malt, bottles, and corks, and not instruments potentially incidental to the *consumption* of alcoholic beverages, *e.g.,* shot glasses and beer mugs. The two-pronged inquiry has found its expression in two categories of decisions. In the first, the courts have noticed and discussed the sinister qualities of the particular item or substance at issue.[*] In the second, the courts have recognized the inherently innocent nature of the object or substance at issue, and therefore have evaluated the circumstances *extrinsic* to the neutral material to determine if a *nexus* with criminal activity is evidenced. Intent sufficient to justify conviction or for-

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[*] *See* e.g., *Israel* v. *United States,* 63 F.2d 345, 346 (3rd Cir. 1933) (copper boiler of unique construction); *United States* v. *Brunett,* 53 F.2d 219, 231-35 (W.D. Mo. 1931) ("inherent qualities of the preparation, compound and substance . . . peculiarly designed for unlawful use"); *United States* v. *Nomel Products Co.,* 47 F.2d 575, 577 (2nd Cir. 1931) (extract of ginger not *per se* fit for beverage purposes, so evidence insufficient); *Hawthorne* v. *United States,* 37 F.2d 316, 318 (4th Cir. 1930) (denatured alcohol has no alternative lawful use and is obvious precursor to beverage alcohol); *Jones* v. *United States,* 11 F.2d 98 (4th Cir. 1926) (denaturing chemical easily removable from denatured alcohol); *Stroh Products Co.* v. *Davis,* 8 F.2d 773, 777 (E.D. Mich. 1925) ("reasonable inference from the contituency of the preparation that it was designed for [illegal] purpose"); *Weinstein* v. *United States,* 293 F. 388, 389 (1st Cir. 1923) (three-gallon still designed for manufacture of intoxicating liquors).

feiture has been inferred in very limited circumstances which reliably establish the criminal involvement of the neutral object or material, such as the *actual* presence of illegal liquor at the scene where the material was discovered, inculpatory statements regarding the material by its owner, or the possession without explanation of huge quantities of liquor-making ingredients.[10]

In *Danovitz*, v. *United States*, 281 U.S. 389 (1930), this Court upheld the forfeiture of empty cans and

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[10] *See e.g., Danovitz* v. *United States*, 281 U.S. 389 (1930) *aff'g Feitler* v. *United States*, 34 F.2d 30 (3rd Cir. 1929) (bottles, corks, selling wire discovered with quantities of liquor and forged strip stamps); *United States* v. *Ragland*, 306 F.2d 732, 735 (4th Cir. 1962) (large quantity of sugar and written materials discussing the use of sugar in the manufacture of liquor); *Chapman* v. *United States*, 271 F.2d 593, 594 (5th Cir. 1959) (sugar, rye and yeast held to be precursors of illegal liquor because of the defendant's inculpatory statements and participation); *United States* v. *2265 One-Gallon Paraffined Tin Cans*, 260 F.2d 105, 107 n.1 (5th Cir. 1958) (inculpatory statements); *DeHart* v. *United States*, 237 F.2d 227 (4th Cir. 1956) (large quantity of sugar purchased under fictitious name; inculpatory statements by defendant); *Snead* v. *United States*, 217 F.2d 912 (4th Cir. 1923) (yeast and barley malt purchased under surrepticious circumstances, and claimant failed to proffer explanation); *Stroud* v. *United States*, 199 F.2d 923, 924 (5th Cir. 1952) (claimant seen transporting containers containing non-tax paid whiskey); *Borgia* v. *United States*, 78 F.2d 550 (9th Cir. 1935) (defendant linked to truck and precursors found at distillery); *Vukich* v. *United States*, 28 F.2d 666, 667 (9th Cir. 1928) (corn sugar found in defendant's car and at distillery); *United States* v. *One Lot of Intoxicating Liquor*, 27 F.2d 903 (S.D. Tx. 1928) (inculpatory statements and presence of whiskey); *cf. Nosowitz* v. *United States*, 282 F. 575 (2d Cir. 1922) (copper parts capable of many lawful purposes, so evidence insufficient).

bottles, corks, and other materials based on their being "offered for sale in such a *mode* as purposefully to attract purchasers who wanted them for unlawful manufacture. . ." (emphasis added) *Id.* at 397. The "mode" briefly alluded to by this Court is expanded upon the decision by the lower court in the same case, *sub nom. Feitler* v. *United States*, 34 F.2d 30 (3rd Cir. 1929). In *Feitler*, the Third Circut noted that quantities of illegal liquor, forged "strip stamps" bearing the names of distillers, and substances useful in adding flavor to a fermenting alcoholic beverage were displayed for sale with the empty containers, and other intrinsically lawful materials. The criminal *nexus* in that case was described by the court of appeals:

> [W]hen, not standing alone, [otherwise lawful articles] are assembled and put on sale *with clearly forbidden property*, they take on a new character and themselves become contraband because *intimately associated* with unlawful manufacture and *inseparably connected* with the sale of the unlawfully manufactured product. (emphasis added).

Id. at 33. Despite the implication in *Danovitz* that a mere assemblage of lawful items can sometimes be an illegal merchandising "mode," it is clear that the facts of that case established a definite *nexus* between lawful items and ongoing criminal activity. The actual presence of *per se* contraband (liquor) and the unique facts limit the holding in *Danovitz* to the situation there presented.

Unlike the traditional *derivative* contraband/*per se* contraband formula followed by prior criminalizations of ordinary, lawful objects (not inherently sinister), "drug paraphernalia" laws are peculiarly targeted against merchants, "manner of marketing," and innocent merchandise as commonplace as cigarette rolling papers, scales and

smoking pipes. In the drug-free commercial setting (*e.g.*, the retail business where items are displayed on shelves and under glass counters), a concrete *nexus* between an innocent item (*e.g.*, a pipe) and ongoing or consummated criminal activity (e.g., residue inside a pipe, or contemporaneous sale of drugs) cannot be constitutionally presumed. The variety of inherently innocent merchandise potentially subject to the restrictions and burdens of these laws is limitless, including everything potentially usable with drugs. Burdening lawful objects with the label of "instrumentality of crime" without first establishing the criminal *nexus* is unprecedented in the law and can find no support in the other forms of "paraphernalia" laws discussed herein. It is obvious that no merchant of crow bars or copper tubing could allege standing to challenge as facially vague a burglary tool statute or a bootlegging paraphernalia statute without first being subjected to prosecution. *See Bambu Sales, Inc.* v. *Gibson*, 474 F.Supp. 1297, 1305-6 (D.N.J. 1979). Because the essential ingredient of *nexus* is ignored in all recent efforts to ban or regulate items deemed drug-related, merchants of pipes and cigarette rolling papers suffer the threat of enforcement and, without exception, have been found to have standing to challenge these laws as vague on their face and as applied.

SUMMARY OF THE ARGUMENT

The Appellee first submits that the standard of review to be applied to the subject Ordinance should be a stringent one. Due to restraints on protected expression imposed by the Hoffman Estates Ordinance and Guidelines, a more probing and critical examination is warranted. Moreover, the Appellee contends that the penal nature and high potential for discriminatory en-

forcement and abuse militate in favor of the most stringent standard of review.

The Appellee primarily complains that the Ordinance is void for vagueness because it fails to satisfy the first due process requirement: that it give fair notice of its proscription to those expected to obey the enactment. The Seventh Circuit Court of Appeals properly recognized that neither the Ordinance nor the Guidelines provide ascertainable standards for merchants who must conform their conduct to the dictates of the law. The phrase "designed or marketed for use" fails to give fair notice.

The Appellee further submits that the Hoffman Estates scheme is so vague as to bestow almost total discretion upon police the officer on the beat, and leaves determinations of guilt to the speculation and perhaps prejudices of judges, juries and administrative tribunals. The enactment in question thus also fails to satisfy the second due process requirement: the requirement of explicit standards for those who must enforce the enactment.

The Appellee rejects the attempts of the Appellants to asserts for the first time the allegation that the Ordinance includes the requirement of a scienter element. The record and earlier writings of the Appellants, as well as the decision of the District Court clearly indicate that the subject of the litigation below is a strict liability system burdening an undefined class of physical objects. Assuming, *in arguendo,* that a scienter element might apply, the Appellee argues that the cosmetic addition of such an element is illusory and fails to ameliorate the facial vagueness inherent in the concept of punishing lawful items in the absence of a concrete connection between the items and actual criminal activity.

Finally, the Appellee submits that the Amici of Arkansas, *et al.*, and the Village of Wilmette are, in essence, requests for this Court to render advisory opinions in violation of Article III, §2 of the United States Constitution. The Amicus brief of the Community Action Against Drug Abuse is premised entirely upon presumptions patently controverted by the record below.

STATEMENT OF THE CASE

On February 20, 1978, the Village of Hoffman Estates Board of Trustees (Village) enacted Ordinance No. 969-1978, entitled "An Ordinance Amending the Municipal Code of the Village of Hoffman Estates By Providing for Regulation of Items Designed or Marketed for Use with Illegal Cannabis or Drugs." (Constitutional Provisions, Ordinances and License Guidelines Involved). Village President Virginia Hayter cast the deciding vote breaking the three to three tie vote in the Board of Trustees and thereby enacting the Ordinance. (J.A. 75). The preamble to the Ordinance acknowledged that its subject matter consists of legal retail items.

The subject ordinance acts as both a prohibition and a regulation of businesses that are deemed to come within the scope of the legislation. Section 1C prohibits the sale or gift of any item regarded as falling within the purview of the Ordinance to minors. The regulatory aspects of the Ordinance concern their sale to adults. The regulatory provisions require a business considered to be engaged in the retailing of things "designed or marketed for use with illegal cannabis or drugs" to obtain a special license. An applicant must pay a $150 dollar fee and provide affidavits establishing that every employee authorized to sell any of these "things" has never been convicted of a drug related offense. Section 1B, Section 2.

Once a businessman has succeeded in acquiring the license, the Ordinance requires that he maintain a police register memorializing the name and address of each purchaser, the date and time of sale, the name and quantity of the product, and the signature of the licensee or his agent. The police register must be kept available for police inspection during business hours, and must be retained for two years. Section 1D. A violation of the Ordinance is punishable by a fine of not less than $10 or more than $500, with each day that an alleged violation continues constituting a separate and distinct offense. (Section 3).

The Village almost contemporaneously issued "License Guidelines" intended to be read in conjunction with the ordinance and acknowledged to be critical to its interpretation. (J.A. 68, 69). The District Court found the License Guidelines to be an integral part of the Ordinance. (Juris. St. 33a). The License Guidelines assert that cigarette rolling paper of colorful design, cigarette rolling paper with names oriented for use with legal cannabis or drugs, and "roach clips," are automatically within the purview of the Ordinance. Pipes and "Paraphernalia" fall within the ambit of the Ordinance depending upon their "proximity" to non-white cigarette rolling papers, "roach clips," or literature deemed to encourage illegal use of cannabis or illegal drugs. (Constitutional Provisions, Ordinance, and License Guidelines Involved).

The evidence established that no experts or statistics were consulted by the Village to determine whether any relationship existed between the Ordinance and actual drug abuse in the community, what type of item is "designed or marketed for use with illegal cannabis or drugs," or whether there existed an objective basis for distin-

guishing between the burdened items and other concededly "lawful items" not regulated by the Ordinance. (J.A. 55, 56, 75; Preamble to the Ordinance). However, "studies" allegedly conducted by the Village led them to conclude that Flipside Records was the only merchandiser in Hoffman Estates that carried "that kind of merchandise." (J.A. 57, 58).

The Flipside, Hoffman Estates, Inc. (Flipside) is an Illinois corporation that owns and operates a business known as Flipside Records, located at 2348 West Higgins Road, Hoffman Estates, Illinois. Flipside Records opened its doors for business in June, 1976, and ever since has displayed and sold phonograph records, recording tape, clothing, decorative mirrors, jewelry, snuff, tobacco snuff and snuff accessories, and a variety of literature including "National Lampoon", "Rolling Stone", and "High Times." (Transcript, September 1, 1978—6, 7). Although some of the merchandise sold at Flipside Records could be considered to have had an unusual or outlandish appearance, every item had a recognized and lawful purpose. There were no provocative displays, tags, instructions or other merchandising techniques which suggested or encouraged an unlawful use for the shop's merchandise. (J.A. 42, 43).

Items that were small and fragile, and therefore susceptible to shoplifting or breakage, were kept in locked display cases near the cash register, and the assistance of a salesperson was required for purchase. (J.A. 43). Literature and periodicals were also displayed near the cash register because they were considered most effectively offered as a "point of purchase" or "impulse" item. (J.A. 43).

The evidence established that other merchants in Hoffman Estates sold and have continued to sell items functionally indistinguishable from those sold by Flipside without being considered subject to the Ordinance, e.g. Osco Drugs sells colored cigarette rolling papers, cigarette holders, pipes, and plastic squeeze bottles. (Plaintiff's Exhibits Numbers 26, 27, 63, 64, 65).

After the enactment of the Ordinance and License Guidelines, agents of the Village advised Flipside that it was subject to the Ordinance and that failure to comply would constitute a violation. (J.A. 70). Larry Rosenbaum, an officer of Flipside, telephoned Richard Williams, Hoffman Estates Village Attorney, and inquired what items were covered by the Ordinance. (J.A. 70). Mr. Rosenbaum was told that "[f]or his protection" it would be best to use the police register for every item sold in his store. (J.A. 70, 71). On advice of counsel, Flipside removed an extremely wide variety of merchandise, including literature, from its shelves and display cases. (J.A. 46, 47). The sole purpose of this mass removal was to avoid at all cost a violation and arrest which might have precluded Flipside from having access to a federal forum for the adjudication of its constitutional claims.

Flipside Records initiated proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, on May 30, 1978, seeking a declaratory judgment that the Ordinance violated the First, Fourth, Fifth, Eighth and Fourteenth Amendments, Article I, Section 8, Clause 3 and Article I, Section 10 of the United States Constitution pursuant to 42 U.S.C., Section 1983 and 28 U.S.C., Section 2201 and 2202; and further seeking temporary, preliminary and permanent injunctive relief and damages pursuant to 42 U.S.C.,

Section 1983 for the actions of the Village and its agents, under color of law, which caused Flipside Records to be deprived of rights secured to it by the United States Constitution.

On May 30, 1978, the Honorable George N. Leighton denied Flipside's emergency motion for a temporary restraining order.

On September 1, 1978, a hearing on Flipside's motion for preliminary injunction was held before Judge Leighton. (J.A. 38). Larry Rosenbaum, an officer of Flipside, testified that although Flipside was licensed to sell general merchandise, he was uncertain whether Flipside should be required to obtain the new special license pursuant to the Ordinance, and, if so, what items in his inventory must be recorded in the police register and preserved for police inspection. (Transcript, September 1, 1978—10; J.A. 46, 47). Mr. Rosenbaum testified that no information provided by the Village clarified the nature and scope of the burdens created by the Ordinance. (J.A. 44, 45). To Mr. Rosenbaum's knowledge there was no basis for a belief that colored cigarette rolling papers were designed for use with illegal substances. (J.A. 43). The word "proximity" was never defined for Mr. Rosenbaum. (J.A. 48). Mr. Rosenbaum testified that the removal of items from display was not intended to acknowledge that Flipside was engaged in retailing items designed or marketed for use with illegal cannabis or drugs. (J.A. 46, 48).

The Village called upon Police Officer Earl W. Maurer to testify. (J.A. 49). On direct examination, Officer Maurer testified that a "power hitter" is a plastic bottle used for smoking; that he has seen "roach clips" worn on people as items of jewelry and in "active use"; that whenever he had come in contact with "roach" clips and

"bomb [sic]" pipes analysis showed that cannabis had been smoked in them; that on one occasion analysis had shown that tobacco had been smoked in a "bomb [sic]" pipe; that he has seen marijuana cigarettes that had been "rolled"; and that he has never noticed simple white cigarette rolling papers being used by farmers in the community. (J.A. 51, 52, 53). On cross-examination Officer Maurer admitted he had read none of the literature displayed at Flipside and acknowledged that he was familiar with the expression "[y]ou can't tell a book by it's cover." (J.A. 53).

At the conclusion of the September 1, 1978 hearing, Judge Leighton denied Flipside's motion for preliminary injunction.

The trial for permanent injunction and declaratory judgment was held on March 23, 1979. Testimony was heard from Village Attorney Richard Williams, who drafted the Ordinance and License Guidelines, and Village President Virginia Hayter. (J.A. 60, 74).

Mr. Williams testified that althought he had never used a "roach" clip, he understood it to be an item that holds a hot burning cigarette so as to enable the smoker to get down to the last puff while avoiding the heat. (J.A. 58). Mr. Williams acknowleged that there are many methods to reduce the heat of a cigarette. (J.A. 59). After being shown a medical clamp (hemostat) and a device called an "Aquafilter," Mr. Williams explained his understanding of the Ordinance:

> If they market it with other items that the police tell me they have found in evidence with traces of cannabis and other items, then they are marketing it for use with marijuana.

(J.A. 58, 59, 60). When shown an alligator clip from the Flipside store and an alligator clip obtained in a Hoffman Estates Ace Hardware Store, Mr. Williams conceded that there was no design differential between the two, but maintained that the Flipside alligator clip would be covered by the Ordinance while the Ace Hardware alligator clip would not. (J.A. 66, 67). The Ace Hardware clip would not be regulated because it "looks like it is designed and marketed for use for electrical connections." (J.A. 67). When asked if the Flipside alligator clip would be covered if it was displayed without any signs in an area where literature was displayed, Mr. Williams stated:

> It would be if an officer could tell me that it can be used or is presumed to be used for illegal cannabis and drugs.

(J.A. 67).

Mr. Williams further testified that the mere proximity of certain literature to other items would cause a store to fall within the ambit of the Ordinance, and therefore be "taxed" and its customers subjected to the requirement of the police register. (J.A. 62). Also, the presence of a provocative word, design, decal or emblem on an item may be sufficient to identify that item as designed for use with illegal drugs. (J.A. 62). With regard to a jewelry item called "Roach Clip earrings" which bear on their package the slogan "Express Yourself", Mr. Williams stated that he did not believe they could be regulated "unless an expert trained and experienced in the field could say that he has found those to be used with illegal cannabis or drugs." (J.A. 64).

Mr. Williams also testified that unless a merchant acknowledged that every item in his store is designed or

marketed for use with illegal cannabis or drugs, the merchant would conceivably be required to litigate at administrative hearings the design of every item in his inventory, as well as his intended manner of display, in order to know if the sale of a particular item rendered him liable to punishment. (J.A. 64, 65).

When asked how a person would know whether items he sold were covered by the Ordinance, Mr. Williams testified that it would depend on the marketing aspect of the item. (J.A. 72). When asked what is the key to the marketing aspect and how it is reflected in the Ordinance, Mr. Williams responded that "[t]he key is when you have all of those items such as that are on your table, [Exhibits] one through 80, many of which when displayed with tobacco, [or] displayed elsewhere in the store, may well not be designed and marketed for illegal use, but when displayed together create one marketing concept of illegal use with illegal drugs." (J.A. 72). According to the drafter of the Ordinance and License Guidelines, proximity to other items alone is sufficient to change the essence of an item so as to render it subject to the burdens of the Ordinance. (J.A. -73). Mr. Williams explained by stating that he "think[s] the nature of marketing changes the presumptive use when they are placed with other items such as roach clips and those mentioned that would be illegal." (J.A. 73). When the questioning turned toward how many items were necessary to trigger the Ordinance, Mr. Williams admitted advising Mr. Rosenbaum to use the police registry for every item in the store. (J.A. 71).

Village President Virginia Hayter testified that she did not know what "paraphernalia designed or intended for

use with illegal drugs" is, because she is not an expert. (J.A. 75). In Ms. Hayter's opinion a hemostat and a glove stretcher, if displayed together, would not be covered under the ordinance because they have lawful purposes. (J.A. 77, 78). Ms. Hayter presumed that white cigarette papers would be within the purview of the ordinance if they bore the slogan "after all, it is only a weed that turns to a flower in your mind," although she acknowledged that the slogan "to some would mean one thing and to some other people it would mean some other things." (J.A. 78, 79).

As counsel for Flipside Records attempted to ascertain from the Village President what type of literature encourages the use of drugs, the trial judge questioned the necessity of hearing further evidence stating "I don't need any witness to tell me what papers are, what roach clips are and what pipes are. I know the meaning of paraphernalia." (J.A. 80, 81). He suggested that the proceedings could be shortened by stipulation. (J.A. 81, 82). Subject to the filing of written memorandum identifying the retail source of the 80 exhibits, the parties stipulated to their admission into evidence. (J.A. 81, 82).

Ms. Hayter then testified about pipes. She concluded that if they were the kind she had never seen used for ordinary tobacco, or if the aperture did not appear to be the kind that her husband's pipes have, then they are drug paraphernalia. (J.A. 85). However, since she is not an expert, Ms. Hayter testified that she relies "on those people who know what drug paraphernalia is, per se." (J.A. 84).

At the close of the hearing, the trial court requested the parties to submit proposed findings of fact and conclusions of law. (J.A. 86).

On May 14, 1979 and July 9, 1979, the parties filed with the Clerk of the District Court the following stipulations and stipulated testimony:

1) Ordinance 932-1977 was made part of the trial record. (J.A. 19).

2) That John O'Connell, Chief of Police of Hoffman Estates, would testify that any pipe could be used to smoke marijuana; that the presence of a phrase or picture suggesting possible association of an otherwise lawful item with a controlled substance (e.g., a marijuana leaf) would subject the item to coverage; that selling pipes or other smoking material in proximity to literature concerning drugs could activate the license requirement; that if an existing pipe store began to sell certain literature such as High Times and Stone Age then the sale of all pipes would fall under the regulations and prohibitions of the ordinance; mirrors are not covered by the ordinance; scales would be covered if they exhibit suggestive phrases or pictures; that the purpose of the police register is to discourage persons in the Hoffman Estates community from purchasing those items; and that Chief O'Connell is unable to make specific determinations as to what items are covered and that those determinations would be left to the judgment of detectives on his staff. (J.A. 33, 34).

3) That Donald Levin, President of Adams Apple Distributors, Inc., would testify that Plaintiff's Exhibit 1-15, 28-60, and 66-79 were identical or similar to items furnished by Adams Apple Distributors, Inc. to Flipside Records. (J.A. 27, 28).

4) That Larry Rosenbaum, agent for Flipside Records, would testify that Plaintiff's Exhibits 1-25, 28-60, and 66-79 were items displayed and sold at Flipside Records

prior to May 1, 1978, the effective date of the ordinance. (J.A. 29, 30).

5) That Helen Wozniak, Clerk of the Village of Hoffman Estates, would testify that the subject ordinance is regulatory; that the $150.00 fee was established to compensate the Village for the costs of administering the ordinance; that the Village's general business licenses cost $30.00; that the additional cost created by the subject ordinance is assessed to compensate additional expenses. (J.A. 35, 36).

6) That a pipe expert would testify that pipe smoking has been a human habit for over 1,000 years, that pipes can be fashioned from almost any type of material, that pipe bowls and stems are of various shapes and sizes, that design is a matter of the personal preference of the user, and that there is a nationwide market for all pipes as collectibles. (J.A. 25, 26).

7) That Dana Mallek, deputy Clerk of the Circuit Court of Cook County, Illinois, would testify that the number of cannabis and controlled substances prosecutions in the Village of Hoffman Estates in the months of July, August, September and October in 1978, when the ordinance was in effect, was more than twice as great as the same months of the previous years, when the ordinance was not in effect. (J.A. 37).

On February 15, 1980, Judge Leighton entered a Memorandum order awarding judgment to the Village. (J.A. 88). After denial of Flipside's Petitions for Rehearing and Reconsideration a timely notice of appeal was filed. (J.A. 89, 96, 110).

The United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court, and the Village filed a notice of appeal and filed its Jurisdictional Statement in this Honorable Court on April 3, 1981.

ARGUMENT

I. The Court of Appeals Correctly Found The Hoffman Estates Ordinance And Accompanying Guidelines Unconstitutional For Vagueness Because They Fail To Provide Sufficient Notice To Merchants Or Sufficient Guidelines For Enforcement And Adjudication.

A. The Hoffman Estates Ordinance Exhibits Extreme Potential For Abuse, Infringes Upon First Amendment Rights, And, Therefore, Should Be Subjected To A Stringent Standard Of Review.

The Appellant's initial argument is an attempt to characterize the Ordinance in such a manner as to apply a liberal standard of review. Thus, virtually conceding that the Ordinance could not pass any more rigorous standard, the Appellants' claim that we are concerned with a simple "licensing ordinance," that is "civil in nature," that is "not 'grave,'" but only a mere "economic regulation." (Appellants' Brief - 10, 11, 12). The Appellant respectfully suggests that the due process clause of the Fourteenth Amendment, and the historic concern for the protection of free expression outweigh any comity-based policy of legislative deference in the case at bar.

The Seventh Circuit recognized that the standard of review was not at issue because under any standard of review the Hoffman Estates scheme could not pass the threshold question of vagueness. The Court stated:

> This ordinance is subject to attack for vagueness despite the fact that it is an ordinance, not a statute, and it purports to license, not prohibit, sale of "items designed or marketed for use with illegal cannabis or drugs." A law may run afoul of the vagueness doctrine even though it does not impose

> criminal sanctions, because the fundamental defect is not the penalty but rather "the exaction of obedience to a rule or standard . . . so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239 (1925). The lack of a criminal penalty in the ordinance does not excuse vagueness where the effect is to deprive persons of constitutional rights. *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966) ("this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"). *See* also *Bence* v. *Brier*, 501 F.2d 1185, 1188 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975); *Soglin* v. *Kauffman*, 418 F.2d 163, 166-67 (7th Cir. 1969). Furthermore, in determining whether a civil or criminal enactment is sufficiently clear that persons affected can determine what the law requires of them, the same rules of construction apply whether it is a statute or an ordinance. *Martin* v. *King*, 417 F.2d 458, 461 (10th Cir. 1969). (Footnote Amitted).

Flipside Etc. v. *Village of Hoffman Estates*, 639 F.2d 373, (7th Cir. 1981). The Appellee concurs, but further submits that in the event a particular standard of review must be chosen it should be a stringent one.

This Court has recognized that the problem of determining whether an enactment is penal or regulatory in character has been extremely difficult and elusive of solution. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168 (1963). In *Kennedy*, this Court set forth some of the factors to be considered in making such a determination. Although not conclusive, they are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment —retribution and deterrence, whether the behavior to which it applies is already a crime, whether an

> alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. (Footnotes omitted).

Kennedy v. *Mendoza-Martinez, supra* at 168. This Court has also recognized the attachment of social stigma or damage to reputation as a result of enforcement to also be a factor. *Morisette* v. *United States,* 342 U.S. 246, 256 (1952). The Appellee respectfully submits that an examination of the practical realities envisioned by the Hoffman Estates scheme create at least a quasi-criminal enactment.

First, the Ordinance creates an affirmative restraint in that the merchant is prohibited from employing anyone who has *ever* been convicted of a drug related offense.[11] Second, the requirement of abandoning one's expectation of privacy in his papers has always been a criminal sanction similar to that imposed upon a parolee. The scienter aspect will be discussed in another section of this Brief. Third, the record unequivocally establishes that the Ordinance was intended to discourage the Appellee's business. There can be no doubt that alternatives exist or that the burdens imposed are excessive. Finally, to comply with

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[11] The Appellee notes that the ordinance is also unconstitutional because it denies due process to a potential employee of a retailer deemed covered by the Ordinance if he has ever been convicted of a drug offense. The irrebuttable presumption of unfitness the ordinance creates reaches too broadly since it encompasses persons who may have evidenced their rehabilitation by leading conviction-free lives for many years. The Appellee has never raised this argument solely because it may lack the standing to complain of such an injury. But see *Hilbers* v. *Municipality of Anchorage,* 611 P.2d 31 (Alaska Sup. Ct. 1980).

the Ordinance an applicant must publically admit that he is engaged in the business of aiding others to violate the law. The Appellee suggests that it is obvious that this Ordinance is not a mere licensing law. *See Housworth* v. *Glisson*, 485 F.Supp. 29 (N.D. Ga. 1978) aff'd. 614 F.2d 1295 (5th Cir. 1980).

It is further submitted that a stringent standard of review is appropriate because of the numerous First Amendment violations provided for by the Ordinance and Licensing Guidelines. It is plain from the face of the Ordinance and the License Guidelines that they intrude upon First Amendment rights in at least four ways. First, the Ordinance is unconstitutionally overbroad because it penalizes the sale of lawful items and brings within its sweep protected speech. *Zwickler* v. *Koota*, 389 U.S. 241, 250 (1976). Second, it places a prior restraint on those who would sell literature that might be subjectively deemed drug-oriented and at the same time sell items of ordinary use which otherwise would not be subject to the Hoffman Estates scheme. Although the Ordinance does not go so far as to prohibit the sale of drug-related literature, its inhibiting effect is sufficient to place it in the category of a prior restraint. *Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58 (1963). Any system of prior restraint comes into court bearing a heavy presumption against its constitutional validity. *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975); *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971). Third, the Hoffman Estates scheme infringes protected symbolic speech. The stipulated testimony of Police Chief O'Connell plainly establishes that an otherwise unsuspect item would be presumed *derivative* contraband if it bore anything deemed to suggest drug use. (J.A. 33, 34). Hence, the presence of designs, logos or slogans will trigger en-

forcement. A symbol may be as powerful a statement of an idea as a word and is entitled to as much protection. *Spence* v. *Washington*, 413 U.S. 405 (1974); *Tinker* v. *Des Moines*, 393 U.S. 503 (1969). And fourth, the notion that a display of lawful items may be deemed "marketed for use with illegal . . . drugs" on the basis of some undefined spatial "proximity" to other equally lawful items or literature is sufficient to trigger the onerous and burdensome requirements of the Ordinance is inconsistent with the right to commercial free speech. It is now unquestionably the law that commercial speech is entitled to protection under the First Amendment. *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Board of Pharmacy* v. *Virginia Consumer Council*, 425 U.S. 748 (1976).[12] The Appellee submits that display has been the most primordial and enduring message known to commercial communication. If a hopeful seller cannot arrange and present his wares in a competitive manner for fear of offending a policeman's sensibilities, then a vested government is free to suppress any disfavored merchant. Where protected expression becomes the criterion for the imposition of humiliating licensing burdens, the necessary result is an infringement of First Amendment rights. When legislation affects First Amendment rights it must be subjected to strict scrutiny. *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

The Appellee requests this Court to bear in mind a final potential for constitutional abuse inherent in the

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[12] The Appellee realizes that protected expression is not entirely immune from regulation. These issues were fully briefed but not addressed by the Court below, but are still relevant to this Appeal in relation to a determination of the appropriate standard of review.

Hoffman Estates scheme in its analysis of the appropriate standard of review. The requirement of the police register, in conjunction with the total lack of safeguards in either the Ordinance or the License Guidelines, raises disquieting Fourth Amendment ramifications. This issue was first specifically addressed by the Eighth Circuit in *Geiger* v. *City of Eagan*, 618 F.2d 26 (8th Cir. 1980). The Eighth Circuit noted:

> The ordinance further lacks arrest and search standards for enforcement officials. Under the ordinance, the possession of a "drug-related device" could be the basis for an arrest even if there was no controlled substance present. Also, seeing "any pipe or other object suitable to be used for smoking" could be the basis for a search to determine if characteristics which turned it into a "drug-related device" were present. An arrest for possession of a "drug-related device" could support a search for controlled substances in a vehicle or a home or on a person. Where definite guidelines for enforcement officials are not present, use of the ordinance to expand arrest opportunities and justify searches magnifies the potential harm from enforcement of the ordinance.

Id. at 29. Although the ordinance in *Geiger* imposed a direct criminal penalty, the precise potential for abuse exists in the instant Ordinance. If the "presumption" argued by the Appellant *truly* meets the standards enunciated in *Leary* v. *United States*, 395 U.S. 6 (1969), then one's signing of the police register for the purchase of a pipe could conceivably establish probable cause for the search of his home for narcotics. The Seventh Circuit expressed similar concerns about the dangers inherent in the Hoffman Estates scheme. *The Flipside, Etc.* v. *Village of Hoffman Estates, supra* at 385 n. 29.

Therefore, the Appellee contests the Appellants' characterization of their enactment as a mere "regulation,"

and respectfully submits that the standard of review urged by the Appellants is inappropriate.

B. The Ordinance and Guidelines Fail to Adequately Apprise Merchants Which Items Or Manner Of Display Will Initiate Enforcement?

Village of Hoffman Estates Ordinance 969-1978 purports to license and restrict the sale of alleged drug-related paraphernalia under the rubric "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs." The License Guidelines, adopted almost contemporaneously with the Ordinance and found to be "an integral part" of the Ordinance by the District Court, 485 F. Supp. 400, 404 (N.D. Ill. 1980), purport to define certain terms relevant to the Ordinance. (J.A. 69). Neither document provides ascertainable standards for merchants who must conform their conduct to the dictates of the law, or clear and workable guidelines for enforcement and adjudication. *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). Every phrase of the Ordinance is subjective and open-ended, and the language is woefully lacking in "objective content from which ascertainable standards defining the proscribed conduct could be fashioned." *Bence* v. *Breier*, 501 F.2d 1185, 1190 (7th Cir. 1974), *cert. denied* 419 U.S. 1121 (1975). The Court of Appeals accurately evaluated the language of the Ordinance, as "defined" by the Guidelines, and as interpreted by the Village attorney, the Village President, and the chief of police, and properly concluded that "designed for use" and "marketed for use" were impermissibly vague.

The revelant data supporting the decision of the Court of Appeals, as adduced at the hearings before the Dis-

trict Court through the testimony of the Village attorney, the stipulation of the chief of police, and the language of the Ordinance and Guidelines themselves, suggest two conceptually distinct standards. These standards may be stated as follows:

1. "DESIGNED . . . FOR USE" STANDARD.

An item of merchandise is deemed "designed for use," and therefore subject to the requirements of the Ordinance if, in the opinion of a "trained and experienced officer" on the beat, its particular structural "design" (*viz.* physical attributes) are interpreted to be inherently suited for use with controlled substances, and readily distinguishable from designs which are not. (J.A. 33, 58, 64, 65, 66, 67, 68, 69; Tr. 86; License Guidelines). The Guidelines further provide that cigarette rolling papers that are of "colorful design" (as opposed to white cigarette rolling papers), cigarette papers with trade names "oriented for use with illegal cannabis or drugs," and "roach clips" are items "designed for use" and *per se* within the purview of the Ordinance.

2. "MARKETED FOR USE" STANDARD.

An item is "marketed for use" if its "manner of display" involves its display in "proximity" to items deemed *per se* "designed . . . for use," such as "roach clips," "non-white" cigarette rolling papers, or "literature encouraging illegal use of cannabis or illegal drugs." The display in "proximity" of otherwise neutral and innocent items to *per se* items subjects the entire combination to regulation under the Ordinance. In addition, the display together of a variety of innocent items may be considered to be a suspect "manner of display." (J.A. 33, 34, 59, 60, 61, 62, 72, 73, 74; License Guidelines).

The Appellee submits that while neither standard offers a clear means of distinguishing between items of merchandise covered or not covered by the requirements of the Ordinance, the existence of two standards, which may be applied alternatively, compounds the vagueness of the Ordinance and its Guidelines. The "designed for use" and "marketed for use" standards provide no objective criteria limiting the scope of their coverage. The breadth of the "designed for use" restriction is potentially limitless including anything and everything that could conceivably be used with controlled substances. *See Geiger* v. *City of Eagan,* 618 F.2d 26, 29 (8th Cir. 1980) (Objects "suitable" to be used for smoking controlled substances may depend upon the ingenuity and current practices of drug users); *Music Shop Inc.* v. *City of Ferndale,* 488 F.2d 390, 393 (E.D. Mich. 1980) (Determination of "primary use" requires a consumer survey of the "usually hidden activities and current vogues in use of the unlawful drug abusers as compared to lawful pipesmokers"); *accord Magnani* v. *City of Ames,* 493 F.Supp. 1003 (S.D. Iowa 1980); see also *Cole* v. *State of Oklahoma,* 511 P.2d 593, 595 (Okl. Cr. 1973) ("practically any article that the average person might have in his possession could be used by abusers of controlled substances," and therefore considered to be "paraphernalia."). In construing, the "designed for use" phrase as defined by the Guidelines, the Court of Appeals properly relied upon the trenchant reasoning of the three judge district court in *Indiana Chapter, N.O.R.M.L.* v. *Sendak,* No. TH 75-142-C (S.D. Ind. Feb. 4, 1980) (Swygert, Cir. J. presiding)[13] The *N.O.R.M.L.* court stated:

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[13] Vacated and remanded as moot on appeal because the Indiana legislature had repealed the statute held to be unconstitutional. 631 F.2d 734 (7th Cir. 1980). *See* (Appendix of Unreported Decisions—37a).

> It is unclear what is meant by an instrument "designed" for drug use. The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with [the ordinance] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.

Id., slip. op. at 12-13; (Appendix of Unreported Decisions—48a). The Court below properly recognized the ambiguity inherent in the phrase "designed for use":

> The license guidelines imply that terms "designed" for use with drugs means those items which are inherently suited only for drug use, and are thus covered by the ordinance regardless of the manner of display or avowed intent of the retailer. For example, the guidelines state that "roach clips" are "designed for use with illegal cannabis or drugs and therefore covered," (emphasis added). But the guidelines do not define "roach clip." Consequently, stocking any item that could possibly be used as a roach clip, such as an alligator clip or bobby pin, could subject a retailer to the licensing requirement. In reality, it is inconceivable that sale of these innocent items would subject a hardware store or drugstore to the burdens of the license fee and sales register, as well as to the label of "drug paraphernalia store." Perhaps the village wishes to draw a line between items which inherently are roach clips

and "innocent" items merely used as roach clips. But neither the ordinance nor the guidelines draws this distinction, and we are uncertain as to whether any definition of a roach clip could draw such a distinction based on design alone.

Another item which the guidelines say is inherently drug related is "paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed." But the guidelines also say that "white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed." This guideline attempts to tell the retailer which rolling papers are covered and which are not, but the definition is circular because it puts the burden back on the retailer to decide what is "tobacco oriented" paper not necessarily designed for use with drugs and what is "drug oriented" paper. Is all white rolling paper outside the ordinance, even if there is an advertisement for a water pipe on the package? Does "paper of colorful design" mean that brown or beige paper is covered, or could some colored paper be considered "tobacco oriented"?

An additional element of vagueness in the "designed for use with drugs" standard is added by the fact that the manufacturer, not the retailer, designs the items sold. Consequently, the design intent of the manufacturer, not of the regulated seller, triggers the retailer's duty to obtain a license and the customer's obligation to sign a register available to the police.

639 F.2d at 380-81 (footnotes omitted). The simple assertion that items "designed" for drug use are subject to the requirements of the Ordinance fails to convey the precision necessary to satisfy due process. *Smith et al.* v. *Roark*, (No. 80-2120, May 13, 1980, S.D.W.Va.) (Appendix of Unreported Decisions—77a). As noted by the Court of Appeals for the Sixth Circuit in *Record Revolution No. 6* v. *City of Parma*, 638 F.2d 916 (6th Cir. 1980):

> The major ambiguity in defining drug paraphernalia in terms of the "design" of items is the lack of any design characteristics that distinguish lawful purposes from unlawful purposes. The type of object that can become, or be used as, drug paraphernalia is limited only by the imagination of the user. *Geiger* v. *City of Eagan*, 618 F.2d at 29. The record in our cases established the absence of any unique design characteristics. Plaintiffs' expert, Herbert J. Bessai, testified that the size of a pipe, the presence of a screen or chamber in a pipe, the material from which the pipe is made, or the use of ice, water or air in a pipe does not indicate a design for unlawful use. He discussed in some detail the lawful uses of all of these design characteristics. According to Bessai, the various designed pipes have been used lawfully for centuries. *Rose* v. *Locke*, 423 U.S. at 50, 96 S.Ct. at 244. Bessai's testimony, as the sole expert at trial on the making and smoking of pipes, stands unrefuted. When asked directly if Bessai's testimony was incorrect, Detective Rutt of the Cleveland Police Department's Narcotics Unit testified that he could not say Bessai was wrong. Consequently, we conclude that defining drug paraphernalia in terms of "design" is vague and overbroad.

Id., at 930-31 (footnotes omitted).[14] The substance of Herbert Bessai's testimony is included in the stipulated testimony of the pipe expert in this case. (J.A. 25). The significance of the testimony of these pipe experts cannot be overlooked. Because physical characteristics which unqualifiedly distinguish drug-related merchandise from

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[14] On appeal, this Court dismissed the municipalities' appeal, No. 80-1507, vacated the judgment, and remanded to the Sixth Circuit for consideration in light of Section 2925.14 of the Ohio Revised Code, a statute which makes it a criminal offense for a person to sell or offer to sell "drug paraphernalia" to a juvenile. 49 U.S.L.W. 916 (May 26, 1981).

non-drug-related merchandise cannot possibly be isolated and specifically listed[15], the Village legislature has drafted a sweeping and overinclusive prohibition, and has intentionally delegated to the policeman on the beat the power to determine what species of merchant conduct is subject to the difficult requirements of the Ordinance; and what conduct, while perhaps obnoxious to the police officer's aesthetics or political viewpoint, may be carried on without the merchant's obeying the license and police register requirements and without regard to the placement or content of literature sold by the merchant.

Even the attempts by the Village attorney to apply the Ordinance and Guidelines to specific items clearly show unavoidable confusion. In his testimony before

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[15] *See Record Revolution No. 6* v. *City of Parma*, 492 F. Supp. 1157, 1166 (N.D. Oh. 1980) wherein the District Court noted that "nearly every item that is used with illegal narcotics also has a customary and innocent use," and that "a blanket prohibition would be so imprecise as to lead to selective enforcement which would be unconstitutional;" *cf. Geiger* v. *City of Eagan*, 618 F.2d 26 (8th Cir. 1980), where the Court of Appeals held the rubic "drug-related device" unconstitutionally vague because the enumerated characteristics failed to distinguish tobacco smoking accessories from drug paraphernalia. The Eagan ordinance defined "drug-related device" as "any pipe or other object suitable to be used for smoking" with one of the following characteristics:

1. Contains a visible fine wire mesh screen; or
2. Contains a bowl with the interior surface made of metal, glass, acrylic, plexiglass or plastic; or
3. Contains a bowl with an inside diameter of one-half inch or less at the halfway point between the top and the bottom of the bowl; or
4. Contains a chamber; or
5. Contains a flexible tube or tubes.

the District Court, attorney Williams stated that if an "expert trained and experienced in the field" could say that he had found earrings to be used with illegal cannabis or drugs, they may be covered even though they are marketed as jewelry with the clearly stated purpose —"Express Yourself." (J.A. 63, 64). When discussing enforcement from the viewpoint of a hypothetical "trained and experienced officer," Mr. Williams testified that where any item has been observed in illegal use, similar items of merchandise will be *presumed* to be *per se* covered by the Ordinance (J.A. 65).

The Appellant believes and respectfully submits that this "designed for" standard is not a clear means of distinction. Since all the items sold at Flipside Records are lawful items capable of innocent uses, it is incumbent upon the Village trustees to delineate precisely the design features which are inherently drug-related.[16]

The "marketed for use" standard is equally ambiguous. The foundation of the second standard is the assumption that certain items, when considered in isolation, are deemed "designed for use" with drugs and *per se* within the purview of the Hoffman Estates scheme (the first standard); then that coverage extends to other innocuous, neutral items automatically from their display in mere spatial proximity to these *per se* items. (e.g., a traditional briar pipe displayed in "proximity" to cigarette rolling paper of "colorful design, names oriented for use with illegal cannabis or drugs.") The Court of Appeals noted that neither the Ordinance nor the Guidelines define "proximity." 639 F.2d at 382 n. 23; and that

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[16] The second paragraph of the preamble to the Ordinance provides, "WHEREAS, it is recognized that such items are *legal* retail items and that their sale cannot be banned."

the "manner of display" criterion could encompass any item displayed in "proximity" to "literature encouraging illegal use . . . of drugs."

The Court stated:

> This means that paper clips sold next to *Rolling Stone* magazine conceivably could trigger the requirements of the ordinance. Perhaps the village would not construe the ordinance in this manner. But the point is there is no way for a seller to determine what particular item or arrangement of merchandise will require a license.

Id., at 383. The Court of Appeals correctly recognized the dependency of the "marketed for" standard upon the "designed for use" standard:

> Since . . . the ordinance and guidelines are vague as to what constitutes items designed for use with illegal drugs, the ordinance is equally vague as to what supposedly designed-for-drug items will bring other items under the ordinance through the marketing proximity standard.

Id.

Inasmuch as the "designed for use" criterion is vague in failing to adequately define the items inherently suited for use with drugs, and because the "marketed for use" standard presumes the existence of items "designed for use" with drugs, both standards fail to satisfy due process.

The Appellants argue that the Ordinance applies only to retailers and urge that the case of *McGowan* v. *Maryland*, 366 U.S. 420 (1961) is controlling. (Appellant's Brief—12, 13). The Appellee contends that the Seventh Circuit considered and properly discarded this notion. *Flipside Etc.* v. *Village of Hoffman Estates*, *supra* at

383. The Appellants argue that since Flipside has been deemed engaged in retailing items "designed or marketed for use with illegal . . . drugs," they should be apprised as to the scope of the Ordinance "either through their own expertise or by making reasonable investigations." (Appellants' Brief-13). The Appellee suggests that imposing such a burden on merchants situated like the Appellee is unfair and conclusory. The Seventh Circuit noted that "to apply the *McGowan* analysis here would beg the question in issue." *Id.* at 383. First, it is plain that a merchant cannot simply enter into the realm of drug abusers and conduct a marketing survey to ascertain at any given time what particular items, if any, are specifically designed for drug use; and second, Flipside contests the notion that it is engaged in retailing items "designed or marketed for use with illegal cannabis or drugs." The *McGowan* decision noted an extrinsic and accessible reference source, *i.e.*, the beach or amusement park, by which the merchant subject to such an enactment could easily and reliably determine the items which could be sold on Sundays. In this case no such reference source exists. *See Music Shop* v. *City of Ferndale,* 488 F.Supp. 390 (E.D. Mich. 1980); *accord Magnani* v. *Ames,* 493 F.Supp. 1003 (S.D. Ia. 1980). The Seventh Circuit correctly found that to apply the *McGowan* standard to the Hoffman Estates scheme is to put the cart before the horse.

It is erroneous and unfair to suggest that the removal of merchandise from display and sale at Flipside prior to the enforcement of the Ordinance indicates that the Plaintiff clearly understood the requirements of the Ordinance and Guidelines. (Appellants' Brief-15). Since Flipside refused to acknowledge that it sold or displayed drug-related paraphernalia, the decision was made to re-

move a wide variety of smoking accessories, jewelry, and novelties from display and seek a determination as to the constitutionality of the Ordinance in federal district court. A violation and arrest would have initiated local proceedings, requiring a federal court to abstain from considering Flipside's claims for injunctive and declaratory relief until all state remedies had been exhausted. *Younger* v. *Harris*, 401 U.S. 37 (1971). Without comprehending the restrictions of the Ordinance, Flipside removed all merchandise, including literature, which it felt could conceivably be considered suspect by Village officials. (J.A. 47). Compliance with the licensing and police register requirements was not considered an alternative since The Flipside believed at that time, and continues to believe, that the Ordinance and Guidance are vague and incapable of a workable application. Village attorney Williams testified that when Larry Rosenbaum, one of Flipside's officers, contacted him and requested guidance as to which items would be covered by the Ordinance, Mr. Williams advised him to maintain a sales record of *all* items sold "for his protection." (J.A. 71). It should be self-evident why Flipside sought not to antagonize its customers with the police register procedure; and chose to be overbroad in its removal of merchandise and literature rather than risk a violation. The Court of Appeals properly recognized Flipside's true motivation in removing merchandise from its shelves. 639 F.2d at 380 n. 13.

C. The Hoffman Estates Scheme Countenances Arbitrary and Discriminatory Enforcement By Failing To Provide Explicit Standards To Those Entrusted To Enforce The Law.

The Appellants argue first that because of the License Guidelines and the existence of a Village Administrative Procedure Act; and, second, that since the Hoffman

Guidelines are somehow similar to the tenuous guidelines of the Model Act, they suffice to give notice to the "retailer." (Appellants' Brief-24, 25). However, surprisingly, nowhere in Appellants' Argument IB do they even claim that adequate guidelines are provided to police, judges, or juries. The record is uncontroverted and the Appellants concede that both the Village Attorney and the Village President "admitted they would have to rely on police opinion to inform them which objects were presumed to be [covered]." (Appellants' Brief-5). One portion of the stipulated testimony of Police Chief O'Connell reads as follows:

> The Chief would not be able to state which specific items were covered by the Ordinance and would testify that determination as to which items actually fall under the purview of the Ordinance, at any given time would be left, in large part, to the judgment of detectives on his staff.

(J.A. 35). The record establishes beyond peradventure that the police were given unfettered discretion. Since no objective criteria are included in the Hoffman Estates scheme for discriminating between innocent conduct and "regulated" conduct, the police officer is required to rely upon his subjective opinions, aesthetic preferences and political predilictions.

This failure to set definite and objective standards for enforcement is an impermissible abdication of the legislative function to "those engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10 (1948).

In *Gregory* v. *Chicago,* 394 U.S. 111 (1969), this Honorable Court stated:

> [U]nder our democratic system of government, lawmaking is not entrusted to the moment-to-moment

> judgments of the policeman on his beat. Laws, that is valid laws, are to be made by representatives chosen to make laws for the future, not by police officers whose duty it is to enforce laws already enacted and to make arrests for conduct already made criminal. One of our proudest boasts is that no man can be convicted of crime for conduct, innocent when engaged in, that is later made criminal . . . To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws.

Id. at 121. The Appellee respectfully submits that the Hoffman Estates scheme completely fails to fulfill the crucial second prong of the *Grayned* standard.

The Appellants' next argue that the vagueness of the Hoffman Estates scheme is cured by the existence of an Administrative Procedure Act "for . . . specific regulatory standards." (Appellants' Brief-24). The Appellee suggests that such a notion is illusory. In any such adjudication, the administrative tribunal must of necessity look to the Ordinance and License Guidelines to make any determination. To argue that the Ordinance will in turn be rendered clear is an obvious exercise in circularity. Since the Ordinance is inadequate, License Guidelines were added, and since the License Guidelines are likewise inadequate, the merchant is now afforded the privilege of petitioning the Village officials to make *ad hoc* decisions as to the meaning of their enactment. Enforcement of this scheme would require a licensee to come before an administrative tribunal in advance and submit for their approval such routine matters as adding a new item, changing his retail floor plan, rearranging the items in his display case, stocking various literature, and deciding where it may lawfully be displayed within the store. And the tribunal, armed only with the vague terms of their enactment and their personal opin-

ions, will rule on when a merchant must obtain a license and when his customers must expose themselves to police scrutiny. The Appellee respectfully suggests that the very existence of such a back up system is a monument to the vagueness of the Hoffman Estates scheme.

The Appellants argue that the "marketed for use" phrase finds its basis in the case of *Leary* v. *United States*, 395 U.S. 6 (1969). *Leary* established that for a statutory presumption to pass constitutional muster, empirical data must establish with "substantial assurance" that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Id.* at 36, 37. The Hoffman Estates scheme and the evidence adduced at trial indicate that a regulatable "marketing scheme" would be found whenever one or more items of a genus that police have found in the past to have been used with controlled substances were displayed; or, whenever literature deemed to encourage "illegal use of . . . drugs" were in "proximity." Applied to the Hoffman Estates scheme the question becomes: does the "fact proved" (some ill-defined and nebulous display labeled as the "marketing scheme") provide substantial assurance that the "presumed fact" (the use of so-marketed items with drugs), is more likely than not? *Id.* at 37. The Seventh Circuit answered in the negative, stressing that the primary fact was insusceptible to any proof. Since there is no marketing scheme defined with constitutional adequacy in the Hoffman Estates scheme, the operational "fact proven" can never be established. The fact to be proved is so vaguely intimated and open to subjective and perhaps prejudicial interpretation that neither those who might be deemed expected to comply, nor those entrusted to vigorously enforce the law would be apprised of when the alleged *Leary* presumption

would attach. *Flipside, Etc.* v. *Village of Hoffman Estates, supra* at 382. The Seventh Circuit, in noting the vacuity of the concept of "marketing scheme", correctly distinguished the "rational connection" issue in *Leary* from the vagueness issue presented by the Ordinance. *Id.* Hence, the concept of a *Leary* presumption in no manner tends to satisfy the enforcement prong of the *Grayned* test.

The Appellee respectfully submits that the Seventh Circuit properly found that the Hoffman Estates scheme fails to provide guidelines sufficient to prevent arbitrary and discriminatory enforcement.

II. The Hoffman Estates Scheme Is A Strict Liability System, And, Therefore, The Merchant's State Of Mind Is Irrelevant.

The Appellants apparently view this appeal as an opportunity to suggest a construction of the Ordinance and Guidelines which they never urged before the Court of Appeals or the District Court. The Appellants admonish the Court of Appeals for failing to construe "designed for use" as referring to an intentional act, instead of the particular structural characteristics of an item which has been "designed" for drug use. (Appellants' Brief—16). The Appellees note that this construction is obviously at odds with the plain language of the Ordinance and Guidelines, the interpretation given the "designed for use" phrase by the Village attorney and chief of police, and the construction given the language by other courts. Despite the Appellants' arguments to the contrary, the Hoffman Estates scheme creates a strict liability system. *See* Ill. Rev. *Stat.* Ch. 38, §4-9. It is readily apparent that under the Hoffman Estates scheme, the "designed for use" phrase refers to the physical characteristics of items deemed *per se* fashioned for

use with drugs; and that, if any intentional conduct is implicated by the phrase, it is the intent of the "designer" (i.e., patent holder or manufacturer) whose intent for an item or "design" is absorbed into the physical attributes, or structural "design" of the finished product.[17] Since under the Ordinance and Guidelines the responsibilities of obtaining a license and keeping the police register fall upon the merchant, who merely displays and sells the item, and not upon the manufacturer, who "designs" the item, the plain reading of the Ordinance compels the conclusion that "designed for" refers to the structural "design" of the item displayed, and not to the "design" of the merchant who displays the item.

Prior to this appeal, the Village defendants have openly interpreted the "designed for use" phrase as referring to the drug-related physical characteristics of the item *per se*.[18] Moreover, the Guidelines define what items may

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[17] *Cf. Mid-Atlantic Accessories Trade Ass'n.* v. *State of Md.*, 500 F.Supp. 834, 844 (D.Md. 1980); *accord New England Accessories Trade Ass'n.* v. *Browne*, 502 F.Supp. 1245, 1251 (D.Conn. 1980) (". . . a manufacturer is more likely to 'design' an item for use"). These decisions are concerned with the Model Drug Paraphernalia Act, a criminal law substantially different from the Hoffman Estates Ordinance and Guidelines. In the decision below, the Seventh Circuit specifically commented that the constitutionality of the Model Act was not at issue. 639 F.2d at 386 n. 31.

[18] In their Petition for Rehearing to the Court of Appeals, the Village Defendants argued:

> The Court has ignored the plain meaning of "designed" which requires a construction of *excluvisity*. The Court says at page 15:
> "The term 'designed' could signify only devices that have no use or function other than as a means to
> have no use or function other than as a means to ingest a controlled substance. Alternatively, 'de-

constitute items "designed for use" with drugs (*i.e.*, "paper of colorful design, names oriented for use with illegal cannabis or drugs;" "roach clips"). The position that an intent requirement may be read into the "designed for use" phrase is further undermined by the testimony of the village attorney and the stipulation of the chief of police. During his testimony before the District Court, village attorney Williams consistently focused on the physical characteristics of exhibited items to determine if they were "designed" for drug use. (J.A. 62-68). The stipulation of Chief of Police O'Connell clearly demonstrates how certain design attributes (e.g., a phrase or picture, such as a marijuana leaf appearing on an item) would subject the item to coverage under the Ordinance and Guidelines. (J.A. 33). The Court of Appeals correctly recognized that neither the Ordinance nor the Guidelines draws a clear distinction between items which are inherently drug-related and innocent items which are merely capable of illicit use. 639 F.2d at 380 and nn. 17, 19.

The decisions which have been relied upon by the Appellants in urging a different construction of the "de-

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[18] (Continued)

> signed' could include any devices that have a legitimate function but could be used for ingestion of drug."
> The alternative definition in an exercise to ignore [sic] the ordinary meaning. "Designed" falls under the first definition, a definition with which the Defendant agrees. The second definition providing alternative uses contradicts itself since if the devices have more than one use then it is not designed for "use with illegal drugs"—it is designed for use with illegal drugs and other purposes and falls outside the Ordinance . .
> (Petition for Rehearing 3) (emphasis added).

signed for use" phrase are addressed to the Model Drug Paraphernalia Act, a criminal law substantially different from the Hoffman Estates Ordinance and Guidelines. Unlike the Hoffman Estate scheme, which imposes absolute liability upon merchants deemed covered, the Model Act has been construed to include a scienter requirement in the definition and offense sections.[19] However, numerous courts which have considered the Model Act have concurred with the reasoning of the Court below that "designed for use" vaguely refers to the physical attributes of the item deemed *per se* subject to prohibition under the law. *Record Revolution No. 6* v. *City of Parma, supra* 638 F.2d at 930-32; *accord Florida Businessmen, Etc.* v. *City of Hollywood,* 648 F.2d 956, 957 (5th Cir. 1981) (granting injunction pending appeal); *Eucalyptus Records, Etc.* v. *James,* No. C-81-402-RJM (E.D. Wash.,

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[19] The Model Act is of questionable constitutionality. Three courts of Appeals have considered the law and are in conflict as to its constitutionality. *Cf. Record Revolution No. 6, Inc.* v. *Parma,* 638 F.2d 916 (6th Cir. 1980) *with The Casbah, Inc.* v. *Thone,* ..... F.2d ..... (No. 80-2033, 8th Cir. decided June 8, 1981). The Fifth Circuit is in apparent harmony with the Sixth Circuit. *Florida Businessmen for Free Enterprise* v. *City of Hollywood,* 648 F.2d 956, 958 n. 1 (5th Cir. 1981) (order granting injunction pending appeal).

The Model Act is the creation of a single staff attorney at the Drug Enforcement Administration. Unlike most Model laws, the MDPA is clearly not the product of extensive study and analysis by educators, law enforcement leaders, or experts in the field. It is likely that the MDPA was based in large part on the statutes held unconstitutional by the three judge district court in *Indiana Chapter, NORML* v. *Sendak,* No. TH 75-142-C (S.D. Ind. 1980), but disseminated prior to the filing of that decision. (Appendix of Unreported Decisions —37a).

The Appellee urges this Court to consider the Hoffman Estates Ordinance and Guidelines as *sui generis* and distinct from the Model Drug Paraphernalia Act.

July 21, 1971) (Appendix of Unreported Decisions—1a), (granting preliminary injunction); *Information Management, Etc.* v. *Borough of Pleasant Hills*, 512 F.Supp. 1066, 1073 (W.D. Pa. 1981); *Weiler* v. *Carpenter*, 507 F.Supp. 837, 843-44 (D.N.M. 1981); *Lazy J. Ltd.* v. *Borough of State College*, No. 80-1167 (M.D. Pa., January 30, 1981), *slip* op. at 6 n. 4 (Appendix of Unreported Decisions—65a, 69a, 70a); *Backdoor Records* v. *City of Jacksonville*, 515 F.Supp. 857, 859 (E.D. Ark. 1981); *Gaffey* v. *Babb*, 50 Or. App. 617, 624 P.2d 616, 624-25 (Or.Ct.App.) petition for review denied No. 27709 (Or. June 16, 1981); *See also Record Head* v. *Sachen*, 498 F.Supp. 88 (E.D. Wisc. 1980) (reaching independently the same conclusion as the *Parma* court), and *cf. Hejira Corp.* v. *MacFarlane*, ... F.2d ..... (No. 80-2062, 10th Cir., decided May 5, 1981) ("designed" means "predetermined for a particular use").[20] This interpretation is clearly correct in light of the Model Drug Paraphernalia Act Comments which state:

> Objects whose sole, or at least dominant purpose is to produce, package, store, test or use illicit drugs are considered to be "designed" for such use. A rebuttable presumption exists that these objects are intended for use for the purpose for which they are designed. *See Israel* v. *United States*, 63 F.2d 345 (3rd Cir. 1933). As such, they are presumed to be

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[20] The Colorado statute at issue in *Hejira Corp.* v. *McFarlane* describes "drug paraphernalia" as "any machine, instrument, tool, equipment or device which is primarily adopted, designed and intended for "a drug-related use. The Tenth Circuit upheld the statute after severing the word "adopted" basing its strained rationale on the conjunctive "and" *slip op.* at 11-12. Since the Tenth Circuit decision was handed down, a Colorado state court has pointedly disapproved the reasoning of the Tenth Circuit and enjoined enforcement of the law. *Wakabayashi* v. *Tooley*, No. 81 CV 6293 (Dist. Ct., City and Co. of Denver, Co., decided August 18, 1981). (Appendix of Unreported Decisions—13a; 103a.)

drug paraphernalia. Isomerization devices designed for use in increasing the THC content of marijuana provide a good example.

In *Israel*, the Third Circuit court noted that the "peculiar construction" of copper boilers made them "designed" for bootlegging. *Cf. State of Three ISO-2 Devices*, 296 N.W.2d 510 (S.D. 1980) (Isomerization devices found not inherently criminal). "Designed for use" has been included in numerous statutes to refer to structural design attributes. *See e.g.*, 15 U.S.C. §1171 (a)(2) (gambling device): *United States* v. *Three Trade Boosters*, 135 F. Supp. 24, 27 (M.D. Pa. 1955); *United States* v. *Two "Exhibit Rotary" Coin Op., Etc.*, 107 F.Supp. 314, 316 (W.D. Okl. 1952); 18 U.S.C. §1792 (dangerous instrumentalities): *United States* v. *Swindler*, 476 F.2d 167, 169 (10th Cir.) *cert. denied* 414 U.S. 837 (1973); *United States* v. *Roche*, 443 F.2d 98, 100 (10th Cir. 1971); 18 U.S.C. §2512 (eavesdropping device): *United States* v. *Schweihs*, 569 F.2d 965, 968 (5th Cir. 1978). Moreover, the phrase "designed for use" has been construed so as *not* to require proof of specific intent to disobey the law. *United States* v. *Freed*, 401 U.S. 601, 610 (1971); *United States* v. *Swindler, supra* at 170.

The construction now urged by the Village defendants, that "designed for use" implies a specific intent requirement that might rescue the Hoffman Estates scheme from vagueness is clearly contradictory. Similarly, the suggestion that a particular "manner of display" or combination of items could reasonably give rise to a presumption of intent under the *Leary* doctrine is indefensible since, as the Court of Appeals correctly noted, the "manner of marketing" subject to restrictions under the Ordinance and Guidelines is far too vaguely described to provide guidance for either merchants or enforcement officials. 639 F.2d at 382, n. 21.

III. Assuming In Arguendo The Ordinance Requires An Intent Element, When The Subject-Matter Of An Ordinance Is Not Susceptible To Reasonable Clarity, An Intent Requirement Cannot Cure The Underlying Vagueness.

The Appellee has contended that the Hoffman Estates scheme envisions and establishes a strict liability system. Ill. Rev. Stat. Chap. 38 §4-9. Yet, the Appellant has seen fit to inject for the first time the alleged safeguard of an intent or scienter aspect as an element of the Ordinance. Although Flipside submits that no such element is required by the Hoffman Estates scheme, issues raised by the Briefs of Amici filed in this cause constrain the Appellee to address this variety of contention. At the outset, it should be understood that in regard to the instant cause, actually before this Honorable Court, the following writing should strictly be considered *in arguendo.*

The proposition is advanced that where specific intent is contained in a statute the requirement of scienter or a criminal state of mind alleviates the necessity of providing fair notice under the first prong of the *Grayned* test. (Amicus Brief of Arkansas, *et al.* 10, 11; Appellants' Brief-23). The cases of *Screws* v. *United States,* 325 U.S. 91 (1945) and *Boyce Motor Lines* v. *United States,* 342 U.S. 339 (1952) are relied upon to support this assertion. The Appellee respectfully submits that recent decisions of this Court and *Screws* and *Boyce* themselves belie this argument.

The Appellee contends that conditioning the application of an enactment upon a showing of scienter will ameliorate vagueness deficiencies only in an "as applied" challenge, and, further that the scienter element cannot constitutionally be utilized to define the offense. *Screws* v. *United States, supra* at 101. *The Town Tobacconistic* v. *Degnan,* No. C-2198 80 (Super Ct. Ch. N.J.

March 12, 1981), *slip op.* at 10 (Appendix of Unreported Decisions—93a, 100a, 101a); *Lazy J. Ltd.* v. *Borough of State College,* No. 80-1167 (M.D. Pa. Jan. 30, 1980), *slip op.* at 7-8. (Appendix of Unreported Decisions 65a, 70a, 71a). This Court has recently indicated that the issue of the effect of a scienter element will only be reached after the enactment has been adjudged constitutionally clear. *Caulotti* v. *Franklin,* 439 U.S. 379, 396 (1979). In *Caulotti* this Court found a Pennsylvania provision requiring a physician, when conducting an abortion, to preserve the life of a fetus that he determines to be "viable." Since this Court found the threshold question, the sufficiency of "viability" as used in the statute, void on its face, the scienter issue did not have to be addressed. Id. at 396. The implication is that only when the subject matter of an offense is objectively discernible will a scienter provision be referred to in a determination of whether an enactment is unconstitutionally vague.

An examination of *Screws* and *Boyce* establishes that this Court did not intend to allow the mere inclusion of a scienter element to render unnecessary a clear and precise definition of the offense itself. *Screws* involved the criminal prosecution of a sheriff for the beating and murder of an arrested handcuffed black man. The defendant was charged with acting under color of state law to "willfully" deprive the murder victim of "rights, privileges or immunities secured or protected" to him by the Fourteenth Amendment. The defendant challenged the statute as applied alleging that it was unconstitutionally vague. In the statute at issue in *Screws,* the definition of the offense (i.e., the deprivation of constitutional rights) did not rely upon the scienter requirement. The scienter requirement was relied upon to insure that the defendant knew that a particular constitutional right

existed *and* that he willfully acted to deprive another of that right. "Wilful" scienter is defined in *Screws*:

> When used in a criminal statute it generally means an act done with bad purpose. In that event something more is required than the doing of the act proscribed by the statute. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. And that issue must be submitted to the jury under appropriate instructions.

325 U.S. at 101. (citation omitted). This Court explained that "wilful" scienter may not be used to define the offense, but only to insure that the defendant had knowledge he was engaging in prohibited conduct:

> The requirement that the act must be wilful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain.

325 U.S. at 102.

> . . . [Wilful] conduct cannot make definite that which is undefined. But wilful violators of constitutional requirements, *which have been defined,* certainly are in no position to say they had no adequate notice that they would be visited with punishment. When they act wilfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. When they are convicted for so acting they are not punished for violating an unknowable thing. (emphasis added).

325 U.S. at 105. The reasoning assumed that the "constitutional requirements" were clearly and objectively defined, although not necessarily within the four-corners of the statute, and the definition was sufficiently clear to the defendant Screw whose specific conduct showed clearly that he had acted deliberately to violate the law. The statute in the *Screws* case did not rely upon a finding of

secondary intent (defining the offense) *and* a finding of primary intent (intent to do that which the statute proscribes), because the reasoning assumed that the "constitutional requirement," and therefore, the underlying offense, were defined.

In their respected treatise on substantive criminal law, Wayne LaFave and Austin Scott have noted that "the requirement of fair warning is satisfied if a statute suggests the need to seek legal advise and if the statute's meaning might reasonably be determined through such advice" and quote the following:

> "In general, it would seem fair to charge the individual with such knowledge of a statute's meaning and applicability as he could obtain through competent legal advice provided that the statute gives him enough warning that he ought reasonably to see the need of obtaining such advice." Note, 62 Harv. L. Rev. 77, 80 (1948)

W. LaFave, A. Scott, *Handbook on Criminal Law*, §11, p. 86 and n. 25 (1972). The significance of the *Screws* decision is that the defendant, as a police officer, was held to know the scope of his victim's constitutional rights, because, although subject to change, constitutional requirements are defined and may be ascertained through legal advice. The defendant Screws' conduct showed an obvious disregard for an obvious constitutional right—the right to not be beaten to death by a police officer. Unlike the statute at issue in *Screws*, the Hoffman Estates scheme fails to adequately describe the conduct it seeks to punsh.

In *Boyce Motor Lines* v. *United States, supra*, the company was charged with violating the I.C.C. regulation which required drivers of vehicles transporting explosives or inflamables to avoid "so far as practicable, and where feasible", congested thoroughfares and tunnels.

This Court upheld the indictment because the regulation would apply only in cases where the defendant was *aware* of a safer route and *deliberately* took the more dangerous one or where he wilfully neglected to make inquiry about a safer alternate route. LaFave and Scott have commented on *Boyce* as follows:

> But as Justice Jackson correctly pointed out in his dissent, scienter — at least as it has been traditionally defined — cannot cure vagueness in a statute or regulation. One "knowingly" commits an offense when he knows that his acts will bring about certain results (those defined in the statute in question), and whether he knows that deliberately causing such results is proscribed by statute is immaterial. Because it is knowledge of the consequences of one's actions and not knowledge of the existence or meaning of the criminal law which is relevant, it seems clear that uncertain language in a statute is not clarified by the addition of a scienter element. Stated in the context of the *Boyce* case, the fact that a conviction may be had only if it is found that the driver willfully failed to take or discover a safer route "so far as practicable, and where feasible," does not require proof of actual knowledge or understanding of the quoted language and thus does not serve to clarify that language. Or, to put it yet another way, it is possible willfully to bring about certain results and yet be without fair warning that such conduct is proscribed.

Handbook on Criminal Law, §11, pp. 86-87. Both Screws and Boyce Motor Lines were held to know the subject matter of the law, because reasonable inquiry would have made the obvious known to them. The record herein establishes that not even those responsible for the creation, enactment and enforcement of the Hoffman Estates scheme could determine its scope. And, as noted above, *McGowan* v. *Maryland, supra*, is inapplicable in a situation where the merchant is, in effect, compelled to prognosticate the vogues of imagined and purely potential

criminal offenders. *Cf. Music Stop, Inc.* v. *Ferndale,* 488 F.Supp. 390, 393 (E.D. Mich. 1980) (Vague ordinance "does not refer to or permit investigation by a retailer of ordinary intelligence" and "no fixed extrinsic reference point appears to exist which could be relied upon to alert the retailer of ordinary intelligence and prudence.") *accord Magnani* v. *City of Ames,* 493 F. Supp. 1003 (S.D. Ia. 1980).

If the mere addition of an intent element to any vague criminal law could cure vagueness and satisfy the notice requirement of *Grayned,* no law that requires a knowing or intentional violation could ever be considered vague. *Lazy J. Ltd.* v. *Borough of State College, supra, slip op.* at 8 (Appendix of Unreported Decisions—65a). "If intentional conduct could save all statutes from facial invalidity, then the doctrine of facial invalidity could hardly have arisen." *United States* v. *Baranski,* 484 F.2d 556, 566 (7th Cir. 1973).[21] The *Screws* "exception" would swallow the *Grayned* rule. The Appellee submits hypothetically that a cosmetic addition of a scienter requirement to the Milwaukee police disciplinary regulation held unconstitutionally vague in *Bence* v. *Breier, supra,* would not add objective content to the ambiguous language. Such a regulation might provide:

> "If is an offense to *intentionally or knowingly* engage in conduct unbecoming and detrimental to the service."

An individual who acts willfully and deliberately to violate a clearly defined enactment is presumed to have had

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[21] *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U.Penn. L.Rev. 67 (1960), at pg. 87, n.98, for a discussion of the dangers of relying upon intent, or "scienter," to clarify an indefinite law, and the potentially illusory nature of "clarificatory scienter," and *see also Indiana Chapter, N.O.R.M.L.* v. *Sendak,* No. TH 75-142-C (S.D. Ind. 1980), *slip op.* at 15-16 (Appendix of Unreported Decisions—37a).

fair notice of the law; but, where the nature of the proscribed wrong is a matter of speculation, or where the standard of right-wrong is so open-ended and subjective as to be of no assitance, the person of ordinary intelligence is not given fair notice of what is prohibited. Furthermore, such an undefined prohibition "impermissibly delegates basic policy matters to policemen, judges and juries for solution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and selective application." *Grayned* v. *City of Rockford*, 408 U.S. at 109. Because of the uncertain definition of the offense, and the extraordinary reliance upon scienter to define the offense, police officers, prosecutors, judges and juries must speculate as to the state of mind of an individual based on their subjective impressions of the sincerity of his protestations of innocence, and the inevitable result will be discriminatory enforcement based on chance or prejudice. *Gaffey* v. *Babb*, 624 P.2d at 625.

The Appellee respectfully submits that the appellants and Amici have misconstrued the traditional role of a "criminal intent" and have perverted it in an attempt to define the undefinable. To define the offense solely on the basis of a state of mind is a step toward criminalizing "intentionally committing wrongthink" and is totally alien to American jurisprudence. Since virtually anything can be used for an illegal purpose, reliance on subjective intent alone to define the proscribed conduct cannot rationally be urged to cure obvious facial vagueness. (Amicus Brief of Arkansas, *et al.* — 10, 11, 12; Appellants' Brief — 23).

While the Appellee concurs and sympathizes with the concerns expressed in the Amicus Brief filed on behalf of Community Action Against Drug Abuse, it is constrained to note that these concerns must be addressed in

a constitutional manner. One fatal fault in their argument is that they assume precisely what the record controverts: that the merchant or police officer can readily ascertain what items are "designed for use" with illegal drugs, and that such items are readily distinguishable from items which are not. (Amicus Brief of Community Action Against Drug Abuse — 11, 14, 15, 18). This approach has been recognized as circular and has been tacitly abandoned by the Appellants and never adopted by Amicus brief of Arkansas, *et al.* It also has been flatly rejected by the Sixth, Seventh and Eighth Circuits. *Record Revolution No. 6, Inc. v. Parma, supra; Flipside Etc.* v. *Village of Hoffman Estates, supra; Geiger* v. *Eagan, supra.*

Finally, the Appellee notes that the Amicus Brief of Arkansas, *et al.* urges this Honorable Court to address the Model Act in an unrelated case and without the benefit of a record. (Amicus Brief for Arkansas, *et al.* — *passim*). The various states are effectively asking this Court to render an advisory opinion. The Appellee respectfully submits that no case or controversy regarding the Model Act is before this Court as required by Article III, §2 of the United States Constitution. This is also true of the Amicus Brief of the Village of Wilmette. It clearly seeks an advisory opinion on an ordinance about which there is no justiciable issue before this Court. The Appellee therefore respectfully requests that the issues raised therein not be addressed.

CONCLUSION

Wherefore, on the basis of the above, the Appellee, The Flipside, Hoffman Estates, Inc., prays this Honorable Court to affirm the Judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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